76-7671

In The

Supreme Court of the United States

October Term, 1976

No.

JACK FRIED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on October 7, 1976.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix, *infra,* pages A1a-3a, and has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether fraudulent intent, based upon a claim of reckless disregard, requires a specifically defined duty dependent upon the nature of the representations in issue.

STATUTE INVOLVED

There is here involved §1341 of Title 18 of the United States Code, the provisions of which are printed in Appendix B, *infra*, page A4a.

STATEMENT

On March 26, 1975, petitioner was indicted on 31 counts for alleged violation of Title 18, United States Code, §§1341 and 2. Each count of the indictment charged that the defendant, as principal and/or aider and abetter, devised a scheme to defraud for the purpose of obtaining money by means of false and fraudulent representations from 31 named persons who were induced to order the "Phase Method" for weight reducing. Each count refers to a particular communication which it is alleged the defendant placed or caused to be placed in a mail depository to be sent or delivered by the United States Postal Service to Phase Method. Petitioner was found guilty by a jury on 18 counts in a redacted indictment, and a judgment of conviction was entered in the United States District Court for the District of New Jersey. Petitioner was sentenced to three years in prison on one count of the redacted indictment and placed on five years probation on each of the remaining 17 counts, said probation to run concurrently and to commence upon completion of the term sentence.

The Phase Method was a program which furnished to persons desiring to achieve a given weight loss, character evaluations, based on handwriting analysis, to provide a psychological or motivational factor to adhere to an accompanying diet (70a-71a, 73a, 110a-111a).* The personality evaluations were provided by a computerized method using codes furnished by a handwriting analyst; diets were likewise selected by codes based on desired weight loss (194a-197a, 201a-204a, 259a-261a).

The Phase Method was developed and presented to petitioner by the government's principal witness, Andrew Linick. Mr. Linick represented himself as a knowledgeable expert in the field of nutrition and health (82a). Mr. Linick researched the concept of weight loss through handwriting analysis and informed petitioner that handwriting analysis was a valid tool or method to employ in a weight reducing program (69a-70a, 142a).

Mr. Linick obtained the Phase Method diets by consulting reputable sources such as the Bureau of Nutrition, Department of Health New York State, the American Association of Dieticians Diet, the diet from Johns Hopkins Hospital for fat and reducing, and Weight Watchers (70a-71a). The diets were selected by Mr. Linick on the basis of how many pounds a person desired to lose (71a, 112a).

Mr. Linick selected the graphologist who analyzed the handwriting samples for the Phase Method, selected the computer company with whom petitioner dealt for purposes of fulfilling orders in response to the Phase Method advertising (71a, 107a), designed the name "Phase" (70a, 109a, 136a, 139a), wrote an explanation of graphotherapeutics for use in the Phase Method advertising copy after having researched and read a text on the subject (89a, 113a) and wrote a very complete piece of advertising material which set forth the basic representations included in the Phase Method advertising (135a-136a; Exh. D-2, 486a-489a).

* References to "a" pages refer to petitioner's appendix to the Court of Appeals which has been filed with this Court for use in this proceeding.

The Court of Appeals rejected, without opinion, petitioner's argument, *inter alia*, that the requisite element of criminal knowledge of falsity chargeable to petitioner was not established upon the trial had herein and that petitioner's motions for judgment of acquittal at the conclusion of the evidence and for judgment of acquittal notwithstanding the verdict should have been granted.

REASONS FOR GRANTING THE WRIT

The case of the instant petitioner presents a very important and significant issue as to what is adequate to establish the very serious crime of fraud. If the petitioner's conviction in the instant case were allowed to stand on the kind of evidence presented by the respondent, we would in effect have a rule of law wherein proof of falsity of a representation would be equivalent to proof of fraud. Petitioner respectfully submits that specific and meaningful duties must be defined and guidelines established for the specific elements which must be considered to permit a clear finding of fraudulent intent and knowledge of falsity in the kind of factual pattern evolved by the government in the instant case. Neither the Court of Appeals nor the government responded below to this very important question.

The indictment in the instant case specifically charges that petitioner devised a scheme to obtain money by fraudulent representations and that the defendant "well knew" that the representations were false when made (5a). The significant fact in a criminal fraud case is knowledge of falsity and a specific intent to defraud, *Durland v. United States*, 161 U.S. 306, 313 (1896). As expressed by Justice Minton in *United States v. Wunderlich*, 342 U.S. 98, 100 (1951): "By fraud, we mean conscious wrongdoing, an intention to cheat or be dishonest." A mere showing of falsity without a showing of knowledge of the falsity does not prove the offense of fraud.

There have been numerous cases which deal with the question of fraudulent intent. A review of the decisions, however, fails to set forth or establish useful and precise rules for application to cases of criminal fraud where knowledge or intent is inferred rather than affirmatively established. The problem is one of defining the varying duties that apply to any case of "reckless indifference" in cases based upon very different fact patterns.

In those cases where there is direct evidence of knowledge and fraudulent conduct the need to define the duties applicable to knowledge does not arise. In other cases, however, knowledge of falsity is attributable to the defendant by reason of reckless indifference or disregard. It is the application of this concept of reckless indifference from which knowledge of falsity is inferred which is presented by the instant case. It is the duty which is to be applied which is the essence of what we must consider both in its instant application and in its broad application.

The duty inherent in any contention of reckless disregard as the basis of inferring knowledge of falsity is not the same in all cases. Thus, in *Irwin v. United States*, 338 F.2d 770 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965) the defendant claimed to be selling profitable franchises when his records disclosed they were highly unprofitable; in *United States v. Edwards*, 458 F.2d 875 (5th Cir. 1972) disbarred attorneys promised ironclad divorces using phony procedures under a state law they knew was at best unclear; in *United States v. Henderson & Swaving*, 446 F.2d 960 (8th Cir.), *cert. denied*, 404 U.S. 991 (1971), the defendant claimed ignorance of facts in his own books and records and boasted of being too smart to be caught; in *Holmes v. United States*, 134 F.2d 125 (8th Cir.), *cert. denied*, 319 U.S. 1776 (1943), the defendant misrepresented his assets to investment ratio; in *Slakoff v. United States*, 8 F.2d 9 (3d Cir. 1925) the defendant knowingly gave false figures to his own bookkeeper; in *United States v. Seasholtz*, 435 F.2d 4 (10th Cir. 1970) defendants omitted furnishing relevant information to insurance companies and consulted a lawyer about the legality of their scheme.

In all of these cases, the extent of the duty imposed is of a greater magnitude where the knowledge of the facts presented was under the control of the defendant and readily available to him. In discussing the kind of duty to investigate to be applied to a defendant we find, for example, that the defendants in *United States v. Amick*, 439 F.2d 351 (7th Cir.), *cert. denied*, 404 U.S. 823 (1971), were convicted of securities and mail fraud because the truth regarding the financial condition and sales of the company were in books and records in their control and readily available to them. For the same reason, a salesman who falsely represented the company's monthly production to induce sales, although he admitted to not knowing what the actual production was, was held to have failed to use the reasonable means at hand to learn the true facts. See also *Kaplan v. United States*, 229 F. 389 (2d Cir. 1916), where the court also discussed the duty to refer to records in the defendant's control.

In another line of cases exemplified by *United States v. Jewel*, 532 F.2d 697 (9th Cir.), *cert. denied*, ___ U.S. ___ (1976), where defendant's knowledge of the existence of a particular fact is an element of the offense, the courts have permitted proof of knowledge to be established by showing:

1. An awareness of the high probability of the fact in question (unless the defendant actually believed that it did not exist); and

2. A conscious purpose on the part of the defendant to avoid learning the truth, or as often referred to, "deliberate ignorance" or "willful blindness" to avoid knowing the obvious.

While the court in *Jewel* was divided 5-4 on the adequacy of the trial court's instruction to the jury, the court was unanimous in the application of the standard for proof of knowledge. As noted in the dissenting opinion, this standard "establishes knowledge as a matter of subjective belief, an important safeguard against diluting the guilty state of mind required for conviction" 532 F.2d at 707. See also *United States v. Yasser*, 114 F.2d 558 (3d Cir. 1940).

In *Slakoff v. United States*, 8 F.2d 9 (3d Cir. 1925), the court stated:

> "An incorrect statement, grossly misrepresenting facts, does not amount to fraud in law, unless the false representation was knowingly and willfully made with fraudulent intent." 8 F.2d at 10.

Petitioner submits that there is a duty to refrain from stating as a fact something as to which the utterer had no knowledge, or has knowledge to the contrary, and, there are varying degrees of duties as to ascertaining certain facts that are readily available, such as from an Atlas or from business records. In the instant case, we are dealing with facts involving expert opinions. The duty to be applied in a case such as this should be far different from those discussed above. We are dealing with scientific questions of medical opinion.

It thus becomes necessary to define reckless indifference or disregard as applied to the specific case. In discussing the question of an affirmative duty, the court in *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966) stated, in effect, that there is a responsibility to be discharged and that one cannot totally disregard at least *some* affirmative duty. In that case the court said there would be a failure to fulfill a duty where there was a failure to discharge such duty even in the slightest measure. 366 F.2d at 430.

Petitioner agrees that there is an affirmative duty. The question of law, we submit, is in defining that duty. In this case, it is submitted that petitioner discharged such duty in more than "even the slightest measure". Petitioner relied upon an expert — a man whose background, knowledge, and research ability he had no reason to question. Dr. Andrew Linick, a Ph.D. in philosophy (80a, 81a), had prior knowledge and experience in handwriting analysis (86a, 88a, 137a); Mr. Linick worked closely with the handwriting analyst he selected for the Phase Method

(71a, 87a); he told petitioner he would research the possibility of developing a program of handwriting analysis and diet (69a); he told the defendant he had a knowledge and background in nutrition (82a, 142a); he researched and selected diets from a variety of reputable sources, such as Johns Hopkins Hospital, the American Association of Dieticians and the New York State Department of Health (70a, 71a) and after completing his research he told petitioner a program of handwriting analysis and dieting could be put together (69a). Not only did this expert put the whole program together (he selected the diet, the computer programmer, the graphologist and opened the bank account), but he also wrote the copy which contained the essential representations in the Phase Method advertising (89a, 113a, 135a-136a). Under these circumstances, petitioner submits he did not act with "willful blindness" or "reckless indifference" as these terms have been applied in the past.

In its argument below, the government purporting to rely on the testimony of Linick, sought to attribute knowledge of falsity to petitioner by statements to the effect that petitioner developed the Phase Method advertising, that Linick told petitioner that he (Linick) was concerned about claims in the advertisement and that no testimony exists to support any inference that anyone but petitioner was responsible for the representations in the advertisements. Petitioner submits, however, that nothing actually contained in the testimony of Linick rises to the level of establishing the *mens rea* requisite to a finding of fraud by petitioner.

The sole testimony by Linick as to what he actually told petitioner is that he (Linick) was "concerned" (77a) about a "few things" (78a). He did not testify what if anything he said to petitioner about the nature of his "concern" and he did not testify at all about what the "few things" were with which he was "concerned." Nothing follows. From such testimony no knowledge of falsity can be imputed to petitioner.

Linick also testified that he never told petitioner that the diets would permit a person to lose 12 pounds in a week or 34 pounds in a month (79a). But, Linick did not testify what he did tell petitioner regarding the diets and weight loss. Did he tell petitioner that 11 pounds could be lost in a week, or perhaps 15 pounds? Again, nothing follows. Again this testimony does not impute knowledge of falsity to petitioner. The fact is that there was absolutely no evidence or testimony herein that petitioner wrote or developed the Phase Method advertising matter. Linick never once identified petitioner as having written such advertising. It was Linick who wrote an explanation of graphotherapeutics for use in writing advertising copy after having researched and read a text on the subject (89a, 113a). Further, Mr. Linick wrote a very complete piece of advertising material which set forth the basic representations included in the advertising for the Phase Method (135a-136a; Exh. D-2, 486a-489a). The advertising matter prepared by Mr. Linick with respect to the Phase Method stated, among other things, "quickest, safest way to lose weight . . . based on having your handwriting analyzed with the aid of the latest modern scientific computer machines;" "thousands of people have tried this system;" "never be obese again;" "lose the pounds and inches you desire without feeling hungry;" "the pounds stay off for good;" "more than five years of research by medical doctors and psychographologists working together with the aid of the new micro-scanner;" ". . . losing weight without a great amount of willpower, pills, exercise, going hungry or counting calories;" "at least 15 lbs. in 10 days without feeling hungry. . ." (Exh. D-2, 486a-489a). Linick also testified that "three other people" were involved in writing the advertising copy (135a), but did not name or otherwise identify petitioner as one of those "three other people."

It is respectfully submitted that it is essential to establish a definition of the duty in each instance. In the instant case, the record shows that petitioner affirmatively met a duty to obtain expert information and advice. Most certainly, this record does

not provide the basis for a finding that petitioner failed to fulfill a proper duty so as to constitute fraud or reckless disregard. The instant record does not provide the basis for any finding of knowledge premised upon a theory of a failure to discharge a duty which would be the equivalent of reckless disregard.

In *Yusem v. United States,* 8 F.2d 6 (3d Cir. 1925), the court, in reversing a judgment of conviction, held:

> ". . . a defendant may not be convicted of a crime on . . . careless statements, unless the carelessness is so gross as to amount to fraud or to warrant a finding that he acted fraudulently. An untrue statement, 'a false representation, does not amount to fraud unless it be made with fraudulent intent.'" 8 F.2d at p. 8.

In finding that the evidence in *Yusem* failed to establish that defendant knowingly made false statements with the intent to defraud, the court clearly said that possible carelessness, including careless bookkeeping or careless statements, would not be the basis for a finding of knowledge of intent to defraud. The court noted that a grosser carelessness would be required to make the defendant's conduct a fraud. The court noted that the proof required to establish fraud in a criminal case must be much stronger than the proof required to establish fraud in a civil case such as fraud in bankruptcy. 8 F.2d at p. 8. In the instant case, the question is whether there is such carelessness when a man has obtained all of the relevant information from an expert in this scientific field. The evidence in this record does not demonstrate any acts on the part of the petitioner consistent with such a finding of gross carelessness, knowledge and fraud. See also *Elbel v. United States,* 364 F.2d 127 (10th Cir. 1966) where the Court stated:

> "One cannot be held to guilty knowledge of falsity of his statements simply because a reasonable man under the same or similar

> circumstances would have known of the falsity of such statements." 364 F.2d at 134.

Proof of knowledge is the basic and essential element of the crime of fraud charged herein. In those cases where such knowledge has been premised upon a claim of reckless indifference, the evidence has established acts of commission or omission on the part of the named defendant in breach of an affirmative duty applicable to the facts of the particular case. In no case do we have a standard by which false representations become equivalent to fraud. On the record in the instant case, the government has in effect been permitted to impute to the petitioner knowledge of falsity in the face of petitioner's conceded reliance upon the research and knowledge of Linick and in the absence of some other defined duty that is imposed upon petitioner.

Petitioner submits that in the instant case he has fulfilled a proper duty. No greater duty or more specific duty has ever been defined under existing law. Absent any such definition in terms of the facts and representations here in issue proof of falsity would in effect be equivalent to proof of fraudulent intent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 6, 1976

Respectfully submitted,

s/ Milton A. Bass
s/ Robert Ullman
s/ Sheldon S. Lustigman
Attorneys for Petitioner

APPENDIX A — OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1137

UNITED STATES OF AMERICA

v.

JACK FRIED

Appellant

(D.C. Crim. No. 75-139)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6) October 5, 1976

Before BIGGS, VAN DUSEN and ROSENN,
Circuit Judges

Robert Ullman, Esq.,
Bass, Ullman & Lustigman,
New York City, N.Y.,
Attorneys for Appellant

Jonathan L. Goldstein,
U.S. Attorney;
James A. Plaisted, Assistant
U.S. Attorney;
Newark, New Jersey,
Attorneys for Appellee

Appendix A

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

(1) the Government has failed to establish the requisite element of knowledge necessary to sustain a charge of criminal fraud;[1]

(2) the trial judge committed prejudicial error in charging the jury that the only way in which knowledge of falsity could be shown is by indirect evidence from the surrounding facts and circumstances;[2]

(3) the trial judge committed prejudicial error in his charge concerning the jury's consideration of the money-back guarantee in the "Phase Method" advertising;[3]

(4) the Government failed to establish that the defendant was a principal in the "Phase Method;"[4] and

(5) the trial judge committed prejudicial error in charging that gross carelessness would establish knowledge and criminal intent on the part of the defendant;[5]

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1. *Slakoff v. United States*, 8 F.2d 9, 10 (3d Cir. 1925); *United States v. Jewell*, 532 F.2d 697, 699-701 (9th Cir. 1976).

2. *United States v. Kozak*, 438 F.2d 1062, 1067 (3d Cir.), *cert. denied*, 402 U.S. 996 (1971).

3. *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

4. Appendix Vol. II, pp. 305a-308a; *United States v. Evers*, 448 F.2d 863, 864 (3d Cir. 1971).

5. *Slakoff v. United States*, 8 F.2d 9, 10 (3d Cir. 1925).

Appendix A

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:-

s/ Francis L. Van Dusen
Circuit Judge

Attest:

Dated: October 7, 1976

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

APPENDIX B — SECTION 1341 OF TITLE 18 OF THE UNITED STATES CODE

CHAPTER 63—MAIL FRAUD

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

No. 76-767

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-767

JACK FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this mail fraud prosecution, petitioner contends that the government failed to prove that he knew that claims contained in advertising literature that he mailed were false.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of 18 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment on one count and concurrent five-year probation terms on the remaining counts. The court of appeals affirmed by judgment order (Pet. App. 1a-3a).

The evidence showed that petitioner organized and operated "Phase Method," a business that purported to prescribe diets on the basis of handwriting analysis.

Petitioner conceived of the business in late 1972 in conjunction with Andrew Linick, a martial arts instructor. Linick testified for the government and indicated that he had devised some diets and secured the services of a handwriting expert and computer company (I, 68a-71a).[1] Petitioner handled the advertising and arranged for its printing and circulation (I, 76a).

The advertisements stated that the company's "scientific technique of Graphotherapy" had been used in Europe for 30 years to achieve weight reduction and claimed further that "Medical Doctors and Psychographologists," aided by "the new MICROSCANOR computer," would analyze the subscriber's handwriting in order "to * * * determine the type of formula best suited * * * for losing weight." The advertisements also claimed that the participant could eat as often as desired and still enjoy weight reduction. Laudatory testimonials were included in the advertisements (II, 351a).

In fact, the described weight loss method had never been developed in Europe or anywhere else until created by petitioner and Linick (I, 154a). The diets sent to subscribers by petitioner's company had no relationship to their handwriting; they varied only with the desired weight loss specified by the individual customer (I, 71a, 73a; II, 261a). Although the customer was asked to indicate the speed with which he desired to lose weight, even this element did not, in fact, affect the diet chosen. The computer merely reprinted a diet according to the desired total weight loss indicated on the customer order form (II, 261a-262a, 343a). The weight losses promised were described by a nutritionist testifying for the government

[1]Citations herein are to petitioner's two-volume court of appeals appendix, which he has filed with this Court.

as "highly exaggerated" (I, 152a), "ridiculous" (I, 157a), and "fantastic" (I, 159a).[2] The computer did not analyze a customer's handwriting; it merely printed out one of the eight programmed sets of three paragraph diets (I, 200a, 195a-197a). The testimonials included within the advertisements were also false; the weight loss program supposedly endorsed by the sponsors had theretofore been nonexistent. Over time, these testimonials were repeated word for word, but attributed to new names at new addresses (II, 345a, 347a).

Petitioner characterizes the issue in this case as involving the definition of the requirements for a finding of reckless criminal fraud in "cases * * * where knowledge or intent is inferred rather than affirmatively established" (Pet. 5). Petitioner fails, however, to identify any instruction to the jury that was allegedly improper, and, in fact, the jury was required to find both knowledge of falsity and intent to defraud in order to convict (II, 331a-332a). Moreover, petitioner does not specifically challenge the related jury instruction "to take into consideration all the facts and circumstances shown by the evidence and to determine from those facts and circumstances whether the requisite knowledge and intent were present at the time in question" (II, 332a), and this instruction was a correct statement of the law. See *American Communications Association* v. *Douds*, 339 U.S. 382, 411; *United States* v. *Kozak*, 438 F. 2d 1062, 1067 (C.A. 3), certiorari denied *sub nom. Shopa* v. *United States*, 402 U.S. 996. In fact, petitioner's real grievance is not against the legal standard; rather, his fundamentally factual claim is that "[t]he evidence in this record does not demonstrate any acts on the part of the petitioner consistent with such a finding of gross carelessness, knowledge and fraud" (Pet. 10).

[2]Some guaranteed weight losses that, in fact, could not be accomplished even through starvation (I, 150a).

There is no merit to petitioner's contention that the evidence was insufficient. It is apparent from the record that petitioner knew the claims were false. The evidence showed that petitioner was in charge of developing and circulating the advertising matter for Phase Method (I, 76a, 89a, 187a, 192a)[3] and that Linick and petitioner determined that there would be no relationship between a customer's handwriting and the weight reduction plan sent out (I, 71a, 73a). When Linick specifically cautioned petitioner that he was concerned "because I read certain things [in the advertising copy] that I thought were exaggerated" (I, 118a; see also I, 78a),[4] petitioner responded that it was just "advertising puffery * * * a known thing in the industry" (I, 78a). It was also shown that petitioner had instructed one of the computer companies used by Phase Method to select the diets in a fashion that bore no relation to a customer's handwriting (I, 220a-221a). Finally, since petitioner was the innovator of the Phase Method weight reduction program, he obviously knew that it had not been used in Europe and that the testimonials were false.

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[3]Citing Linick's authorship of Defense Exhibit 2, a rough draft of some advertising copy, petitioner suggests (Pet. 9) that Linick was responsibile for drafting the false advertisement ultimately mailed out by Phase Method. In fact, Defense Exhibit 2 merely constituted Linick's attempt to rewrite some copy given him by petitioner from one of his unsuccessful past diet promotions, and "it was not used because that's not my forte. So evidently, it wasn't good enough" (I, 143a; see also I, 135a-136a).

[4]While petitioner claims to have relied on Linick's expertise, Linick was a martial arts instructor who claimed to be "self-trained" in nutrition (I, 82a-83a). Further, Linick denied advising petitioner as to many of the factual claims made by the Phase Method advertisements (I, 79a-80a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.